



RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44BB(1)(c) OF THE *WORKERS COMPENSATION ACT 1987*.

SUMMARY:

a. The application for procedural review is dismissed.

Introduction and background¹

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 31 March 2015. The Decision advised the applicant that his weekly payments of compensation would cease on 7 July 2016. The applicant applied for internal review on 10 April 2016 and the Internal Review Decision from the Insurer dated 20 April 2016 maintained the original decision.
2. The applicant sought Merit Review from the Authority by way of application received on 6 May 2016. The Authority delivered its Findings and Recommendations² on 1 July 2016. The Authority made a finding that the applicant has a current work capacity and that he does not meet the special requirements set out in Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) which are applicable to a worker after receipt of 130 weekly payments of compensation. This finding led the Merit Reviewer to conclude that a recommendation to the Insurer was "unnecessary," since the finding had the same effect as the decision reached by the Insurer, albeit it was reached by vastly different means.
3. The applicant then applied to this office for procedural review by way of application dated 19 July 2016. It was received in this Office on 28 July 2016. I am satisfied that the application was made within time and in the proper form.
4. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with

¹ There is a convoluted history to the present case, which resulted in two previous procedural review recommendations from this office being reported and numbered as 3216 and 5216.

² A misnomer, since no recommendation was actually made.



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the WorkCover Work Capacity Guidelines (Guidelines). The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

Submissions by the applicant

5. Section 44(1) (c) of the 1987 Act states that this review is “*only of the insurer’s procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer.*” The applicant has applied for a procedural review and made various submissions.
6. The applicant made four specific submissions, which can be described thus:
 - (i) Since the first decision dated 22 March 2016 was withdrawn and replaced by a subsequent decision dated 31 March 2016, the applicant had no opportunity to have the first decision reviewed. The legislation allows 30 days for the applicant to seek internal review, and he was denied this opportunity by the withdrawal of the first decision after only 9 days.
 - (ii) The applicant was given no “fair notice” prior to the making of the second work capacity decision.
 - (iii) Given that the Insurer made two consecutive work capacity decisions based on the one work capacity assessment, this is inconsistent with the doctrine of *Res Judicata*.
 - (iv) The applicant objected to the merit review service referring to medical evidence post-dating the work capacity decision.

Submissions by the Insurer

7. The Insurer provided a helpful chronology, but otherwise made no submissions.

Decision

8. The decision dated 31 March 2016 extended the payments to be made to the applicant from 30 June 2016 to 7 July 2016, after which they ceased.



9. The submissions of the applicant have little in the way of merit. Using the same numbering as in paragraph 6 *supra*, they may be addressed as follows:
- (i) It is inconceivable that a worker is in any way disadvantaged by not being able to challenge or review a decision which no longer exists. Further, the later decision actually conferred on the applicant the benefit of a further seven days of payments
 - (ii) The applicant had been given “fair notice” on 4 March 2016.
 - (iii) Section 44A(3) says: “A *work capacity assessment is not necessary for the making of a work capacity decision by an insurer.*” It follows that the *res judicata* argument is not only misguided by virtue of the Insurer not being a court, but also because the legislation does not require a new assessment every time a decision is made.
 - (iv) The conduct of merit review is irrelevant to procedural review.
10. The Insurer has given the correct period of notice prior to termination of payments.
11. The applicant was advised of the reasoning process behind the decision, in accordance with the Guidelines.
12. The decision was based on available evidence, including reports and certificates produced by the applicant’s own Nominated Treating Doctor (NTD). The NTD certified that the applicant has current work capacity to perform suitable duties for limited hours per week.
13. Given that the applicant does not currently work for the number of hours per week certified by his NTD the Insurer could do nothing other than decide he was not in compliance with the special requirements of section 38(3). This was carefully explained to the applicant.

Finding



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14. There are no procedural errors in the work capacity decision of the Insurer dated 31 March 2016. It follows that the decision was validly made.

RECOMMENDATION

15. The application for procedural review is dismissed.

A handwritten signature in blue ink, which appears to read "Wayne Cooper".

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
11 August 2016